

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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EPIC SYSTEMS CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 3:15-cv-00821-bbc
	)	
YOURCAREUNIVERSE, INC., MEDHOST,	)	
OF TENNESSEE, INC., AND MEDHOST	)	
DIRECT, INC.	)	
	)	
Defendants.	)	

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**DEFENDANTS' PROPOSED FINDINGS OF FACT IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

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In support of their motion for summary judgment, Defendants YourCareUniverse, Inc., MEDHOST of Tennessee, Inc., and MEDHOST Direct, Inc. (collectively, "Defendants") submit the following proposed findings of fact as to which there is no genuine dispute and which entitle them to judgment as a matter of law:

**I. Jurisdiction**

1. Plaintiff Epic Systems Corporation is a corporation organized under the laws of the state of Wisconsin with its principal place of business in Verona, Wisconsin. First Amended Complaint, Doc. 48, ¶ 1; Answer, Doc. 51, ¶ 1.<sup>1</sup>

2. Defendant YourCareUniverse, Inc. ("YCU") is a corporation organized under the laws of the state of Delaware and has its principal place of business in Franklin, Tennessee. Doc. 48, ¶ 2; Doc. 51, ¶ 2.

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<sup>1</sup> The "Doc." References throughout these Proposed Findings of Fact pertain to the ECF docket entries in this case.

3. Defendant MEDHOST of Tennessee, Inc. (“MEDHOST TN”) is a corporation organized under the laws of the state of Tennessee and has its principal place of business in Franklin, Tennessee. Doc. 48, ¶ 3; Doc. 51, ¶ 3.

4. Defendant MEDHOST Direct, Inc. is a corporation organized under the laws of the state of Tennessee and has its principal place of business in Franklin, Tennessee. Doc. 48, ¶ 4; Doc. 51, ¶ 4.

5. YCU, MEDHOST TN, and MEDHOST Direct are related or affiliated corporate entities. Doc. 48, ¶ 5; Doc. 51, ¶ 5.

6. The Defendants have consented to the personal jurisdiction of this Court based on the business they have transacted in the State of Wisconsin. Doc. 51, ¶ 9.

7. This Court has subject matter jurisdiction over this matter because it relates to claims arising under and relating to federal trademark law, 28 U.S.C. §§ 1338(a), (b), 1367. Doc. 48, ¶ 7; Doc. 51, ¶ 7.

8. Venue is proper in the Western District of Wisconsin pursuant to 28 U.S.C. § 1391 because a substantial part of the alleged events giving rise to these claims occurred in this district. Doc. 48, ¶ 8; Doc. 51, ¶ 8.

## **II. Background of Epic and its CARE EVERYWHERE mark**

### **A. Epic’s business**

9. [REDACTED]

[REDACTED] Deposition of Judy Faulkner (“Faulkner Depo”), Doc. 97, 76:15–20.

10. [REDACTED]

[REDACTED] Deposition of Peter DeVault

(Aug. 22, 2016) (“DeVault Depo. I”), Doc. 92, 30:23–31:3; 88:5–14; Deposition of Jackie Gordee (Epic 30(b)(6) Corporate Rep.) (“Gordee Depo.”), Doc. 101, 57:15–58:17.

11. [REDACTED]

[REDACTED] Gordee Depo., 94:18–21.

12. [REDACTED]

[REDACTED] DeVault Depo. I, 88:5–14.

13. [REDACTED]

[REDACTED] Faulkner Depo., 99:1–4; Deposition of Shawn Kiesau (“Kiesau Depo.”), Doc. 106, 73:14–17.

14. [REDACTED]

[REDACTED] DeVault Depo. I, Ex. 33; Deposition of David Fuhrmann (“Fuhrmann Depo.”), Doc. 99, 289:5–25.<sup>2</sup>

15. [REDACTED]

[REDACTED] Faulkner Depo., 90:19–24; Kiesau Depo., 54:1–5; 67:17–70:24; DeVault Depo. I, Ex. 33. [REDACTED]

[REDACTED] Kiesau Depo. 67:17–70:24.

16. [REDACTED]

[REDACTED] DeVault Depo. I, 197:16–198:8, Ex. 27; Faulkner Depo., 91:24–95:1; Kiesau Depo., 52:16–55:12; 72:2–25.

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<sup>2</sup> The deposition exhibits referenced in these Proposed Findings of Fact are attached to the Declaration of David W. Holt (“Holt Decl.”), Doc. 114.

17. [REDACTED]

[REDACTED] DeVault Depo. I, 197:16-198:8, Ex. 27; Faulkner Depo., 91:24-95:1; Kiesau 52:16-54:25.

**B. Epic's creation and registration of the CARE EVERYWHERE mark**

18. [REDACTED]

[REDACTED] Faulkner Depo., 231:14– 233:14; 244:11–16.

19. [REDACTED]

[REDACTED] Faulkner Depo., 225:12-16; 240:5–14; Deposition of Peter DeVault (Epic 30(b)(6) Corporate Rep., Nov. 10, 2016) (“DeVault Depo. II”), Doc. 94, 40:12–41:18.

20. Epic applied for federal registration of the CARE EVERYWHERE trademark on May 13, 2004. Faulkner Depo., Ex. 33; Deposition of Brad Paulson (Epic 30(b)(6) Corporate Rep.) (“Paulson Depo.”), Doc. 109, 43:9–16.

21. Epic's CARE EVERYWHERE mark is registered in Class 9 of the International Trademark Class of goods. DeVault Depo. I, Ex. 33. Epic's trademark registration describes the goods associated with the CARE EVERYWHERE mark as follows:

Computer software for use in the healthcare field, namely software for entering, storing, editing, organizing, integrating, synchronizing, processing, accessing, managing, communicating and sharing data to, from, across and among multiple separate information systems, including heterogeneous systems, and user manuals and documentation packaged with such computer software.

DeVault Depo. I, Ex. 33; Faulkner Depo., Ex. 33.

22. The United States Patent and Trademark Office registered Epic's mark on June 28, 2005. DeVault Depo. I, Ex. 33; Faulkner Depo., Ex. 33; Paulson Depo., 43:9–16.

23. On May 12, 2011, Brad Paulson submitted a combined declaration of use and incontestability for the CARE EVERYWHERE mark on behalf of Epic. DeVault Depo. I, Ex. 26; Paulson Depo., 45:18–47:6.

24. Epic has never registered the CARE EVERYWHERE mark in the state of Wisconsin. Holt Decl., Ex. 33, Epic's Responses to YCU's Second Set of Requests for Admission, Request No. 34.

25. Epic has never conducted any survey, poll, search, study, or other investigation to establish that CARE EVERYWHERE has acquired secondary meaning in the minds of any consumers, whether purchasers of CARE EVERYWHERE or their patients. Holt Decl., Ex. 33, Epic's Responses to MEDHOST of TN's First Set of Requests for Admission, Request No. 8.

**C. Epic's Care Everywhere product and its relation to other Epic products.**

26. Epic uses the CARE EVERYWHERE mark to refer to its interoperability platform. Holt Decl., Ex. 33, Epic's Responses to MEDHOST of TN's First Set of Requests for Admission, Request No. 7; DeVault Depo. II, 20:21–21:4.

27. Epic's CARE EVERYWHERE interoperability platform allows patient data to be exchanged between various end points, which includes Epic facilities, non-Epic facilities, personal health records, health information exchanges, and various governmental entities. Fuhrmann Depo., 39:3–5 (Care Everywhere "is the interoperability application that helps make sure that wherever patients go, their charts go with them."); DeVault Depo. I, 114:18–115:12; DeVault Depo. II App'x, 2:8–17.

28. The purpose of Care Everywhere is to “help traveling patients get care regardless of where they are.” Holt Decl., Ex. 33, Epic’s Responses to MEDHOST of TN’s First Set of Requests for Admission, Request No. 39.

29. [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

30. [REDACTED]

[REDACTED] Fuhrmann Depo., 18:1–4; Kiesau Depo., 31:3–14.

31. [REDACTED]

[REDACTED]

[REDACTED] Fuhrmann Depo. 18:5–8; 112:15–17; Faulkner Depo., 89:2-4; DeVault Depo. I, 88:15–21.

32. [REDACTED]

[REDACTED] DeVault Depo. II App’x, 2:3–3:5.

33. [REDACTED]

[REDACTED]. DeVault Depo. I, 38:7–11, 244: 2–5; DeVault Depo. II, 24:3–25:9.

# **1. Providers’ access to Care Everywhere**

34. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Fuhrmann Depo., 24:18–21; DeVault Depo. I, 71:17–21; DeVault Depo. II, 24:3–25:9.

35. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] DeVault Depo. I, 136:1–12; 136:24–137:3; DeVault Depo. II, 22:19–24:2.

36. [REDACTED]

[REDACTED]

[REDACTED] Kiesau Depo., 40:8–16.

37. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. *Id.*; Fuhrmann Depo., 25:22–26:4.

## **2. Consumers and Patients' access to Care Everywhere**

38. [REDACTED]

[REDACTED]

[REDACTED]. Fuhrmann Depo. 30:22–31:1.

39. [REDACTED]

[REDACTED] Fuhrmann Depo. 27:13–19; 29:8–16;

205:22–206:2; DeVault Depo. I, 38:7–11. [REDACTED]

[REDACTED]

[REDACTED] Deposition of Michael Cohen (“Cohen Depo.”), Doc. 90, 166:21-167:3.

40. [REDACTED]

[REDACTED]

[REDACTED] DeVault Depo. I, 19:11–20:6.

41. [REDACTED]

[REDACTED] DeVault Depo. II, 26:12–27:14.

42. [REDACTED]

[REDACTED] Fuhrmann Depo., 189:5–10;  
DeVault Depo. I, 28:9–22.

43. [REDACTED]

[REDACTED] Fuhrmann Depo., 188:24–189:10; DeVault Depo. I, 28:9–22.

44. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. DeVault Depo. I, 38:20–39:2; 128:23–129:16; 131:1–8.

45. [REDACTED]

[REDACTED]

[REDACTED]. DeVault Depo. II, 27:3–  
27:14.

46. [REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED] DeVault Depo. I, 20:10–21:5.

47. [REDACTED]

[REDACTED]

[REDACTED]

Fuhrmann Depo., 205:22–206:2; DeVault Depo. I, 25:3–7; Holt Decl., Ex. 34, Epic’s Revised Responses to YCU’s First Set of Interrogatories, Interrogatory No. 15.

48. [REDACTED]

[REDACTED]

[REDACTED]. DeVault Depo. I, 46:14–21.

### **3. Health and wellness content**

49. [REDACTED]

[REDACTED] Faulkner Depo., 262:22–263:6; Kiesau Depo., 100:8–11; DeVault Depo. I, 125:17–21; 229:6–10; Holt Decl., Ex. 35, Epic’s Response to YCU’s First Set of Requests for Admission, Request No. 1. [REDACTED]

[REDACTED] DeVault Depo. II, 27:15-18.

50. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] DeVault Depo. I, 21:20–22:4; 23:11–17; DeVault Depo II, 93:10–94:5.

51. [REDACTED]

[REDACTED] Faulkner Depo. 19:19–20:21; 260:17–20; Holt Decl., Ex. 33, Epic’s Responses to MEDHOST of TN’s First Set of Requests for Admission, Request Nos. 11–13; Cohen Depo., 21:7-218:4, 220:18-221:14.

52. [REDACTED]

[REDACTED]. DeVault Depo. I, 29:10–12; DeVault Depo. II, 34:17–35:10.

**D. The Community Connect program**

53. [REDACTED]

[REDACTED] DeVault Depo. I, 137:23-138:5, 138:21-139:11; Holt Decl., Ex. 36, Epic’s Response to MEDHOST of TN’s First Set of Interrogatories, Interrogatory No. 18.

54. [REDACTED]

[REDACTED]. DeVault Depo. I, 137:23-138:5, 138:21-139:11; Holt Decl., Ex. 36, Epic’s Response to MEDHOST of TN’s First Set of Interrogatories, Interrogatory No. 18.

55. [REDACTED]

[REDACTED] Deposition of Alan Hutchison (“Hutchison Depo”), Doc. 104, 9:2-22.

56. [REDACTED]

[REDACTED] Hutchison Depo., 34:5-21.

57. [REDACTED]

[REDACTED] DeVault Depo. I, 216:6-21.

58. [REDACTED]

[REDACTED] Faulkner Depo., 12:14-22,

32:3-5; 163:1-19; DeVault Depo. I, 140:3-141:141; Holt Decl., Ex. 36, Epic's Response to MEDHOST of TN's First Set of Interrogatories, Interrogatory No. 18.

59. [REDACTED]

[REDACTED]. DeVault Depo. I, 223:13-20.

60. [REDACTED]

[REDACTED] Fuhrmann Depo., 171:8-11.

61. [REDACTED]

[REDACTED] Kiesau Depo., 62:4-71:9.

62. [REDACTED]

[REDACTED] DeVault Depo. I, 224:5-12.

**E. Epic's marketing and sales**

63. [REDACTED]

[REDACTED]  
[REDACTED] Faulkner Depo, 57:18–58:16; 64:15–65:5; Fuhrmann Depo., 66:2–5; Kiesau Depo., 18:8–13; 151:16–152:1.

64. [REDACTED]

[REDACTED]  
Kiesau Depo., 10:17–11:17.

65. [REDACTED]

[REDACTED]. Faulkner Depo.,  
65:10–22; Kiesau Depo., 106:17–107:5; DeVault Depo. II, 91:7–92:6. [REDACTED]  
[REDACTED] DeVault Depo. II, 91:7-92:6 [REDACTED]  
[REDACTED]).

66. [REDACTED]

[REDACTED]. Fuhrmann Depo. 66:8–10; Faulkner Depo., 58:3–16; 68:9–15; Kiesau Depo., 16:15–17:9.

67. [REDACTED]

[REDACTED] Kiesau, Depo., 17:10–18:3;  
22:3–7; Gordee Depo., 73:22–3.

68. [REDACTED]

[REDACTED]. Kiesau,  
Depo., 17:10–18:3; 22:3–7; Gordee Depo., 82:3-7.

69. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] Kiesau Depo., 52:20–53:25; DeVault  
Depo. I, 213:12–25.

70. [REDACTED] Faulkner Depo.,  
11:3-5.

71. [REDACTED]  
[REDACTED]. DeVault Depo. I, 197:16-198:8, Ex. 27; Faulkner  
Depo., 91:24-95:1; Kiesau Depo., 52:16-55:12; 72:2-25.

72. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] DeVault Depo. I,  
192:5-194:9.

73. [REDACTED]  
[REDACTED]  
DeVault Depo. I, 197:16-98:14.

74. [REDACTED]  
[REDACTED]  
[REDACTED] Faulkner Depo., 95:21-96:6, 119–121, Ex. 10; DeVault  
Depo. I, 197:16-198:14.

75. [REDACTED]  
[REDACTED]

[REDACTED] Faulkner Depo., 93:2-21. [REDACTED]

[REDACTED]. *Id.* at 94:5-

14. Faulkner Depo., 92:13–93:21.

76. [REDACTED]

[REDACTED] Expert Report of Michael R. Cohen (“Cohen Report”), Doc. 111, Ex. 15; Faulkner Depo., 88:13.

77. [REDACTED]

[REDACTED] Faulkner Depo., 10:17-20; 11:3-5; 91:24-92:5; 98:18-99:4; DeVault Depo. I, 138:16-19; 192:5-20.

78. [REDACTED]

79. [REDACTED]

[REDACTED] Cohen Report, Ex. 15; DeVault Depo. I, 197:16-98:14.

80. [REDACTED]

[REDACTED] DeVault Depo. I, 221:1–19.

81. [REDACTED]

Gordee Depo.,

37:15-16.

82. [REDACTED]

[REDACTED]  
[REDACTED]. Fuhrmann Depo. 102:15–103:2; Kiesau Depo., 109:23–110:8.

83. [REDACTED]

[REDACTED] Gordee Depo., 96:16-22.

84. [REDACTED]

[REDACTED]  
[REDACTED] DeVault Depo. II, 102:14–105:4; Gordee Depo., 37:21-38:3; 73:8-74:17; Gordee Depo. App’x, 9:14-22.

85. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] Faulkner Depo., 60:1–61:13; Kiesau Depo., 110:6–8; 113:18–23; DeVault Depo. I, 40:9–41:13; 42:6–11; 219:12–220:9.

86. [REDACTED]

[REDACTED] Faulkner Depo., 113:6–23.

87. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] DeVault Depo. II, 72:6-9; 94:11–96:22; Paulson Depo., 71:4-72:23. [REDACTED]  
[REDACTED] Gordee Depo., 75:2-14; Jackie Gordee Depo. App’x, 4:5-21;

Paulson Depo., 66:13-68:4. [REDACTED]

[REDACTED] Gordee

Depo., 75:2-14; Jackie Gordee Depo. App'x, 4:5-21; Paulson Depo., 66:13-68:4.

**1. Exposure of facilities and providers to CARE EVERYWHERE**

88. [REDACTED] Faulkner Depo., 70:25–71:6;

Gordee Depo., 11:11-12:10.

89. [REDACTED]

[REDACTED] DeVault Depo. I, 207:8-17.

90. [REDACTED]

[REDACTED]. Gordee Depo., 70:6-72:4.

91. [REDACTED]

[REDACTED]. DeVault Depo. II, 48:1-22; 50:19–51:10.

92. [REDACTED]

[REDACTED] Faulkner Depo., 228:6–23; DeVault

Depo. II, 48:1-22.

93. [REDACTED]



[REDACTED]

[REDACTED] Faulkner Depo., 228:1–5; 229:5–230:1; DeVault Depo. II, 52:6–53:8.

94. [REDACTED]

[REDACTED] DeVault Depo. II, 54:9–55:15.

**2. Exposure of patients to CARE EVERYWHERE**

95. [REDACTED]

[REDACTED] Holt Decl., Ex. 35, Epic’s Response to YCU’s First Set of Requests for Admission, Request No. 3; Holt Decl., Ex. 36, Epic’s Responses to YCU’s Second Set of Requests for Admission, Request No. 31; DeVault Depo. II, 35:18–37:4.

96. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

97. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

98. [REDACTED]

[REDACTED]

[REDACTED] Kiesau Depo., 118:20–120:12.

99. Patients might also be exposed to CARE EVERYWHERE when Epic's customers post public information such as FAQs on their website about the product. Holt Decl., Ex. 36, Epic's Response to MEDHOST TN First Set of Interrogatories, No. 9.

100. [REDACTED]

[REDACTED]

[REDACTED] Paulson Depo., 123:1-23; 125:7-12.

101. [REDACTED]

[REDACTED]

[REDACTED] Paulson Depo., 137:6-10. [REDACTED]

[REDACTED] Paulson Depo. 137:11-138:16.

102. [REDACTED]

[REDACTED]

[REDACTED] Paulson Depo., 126:4-128:5; 129:12-20; DeVault Depo. I Ex. 17 (attached as Ex. 3 to Holt Decl.).

103. [REDACTED]

[REDACTED] Paulson Depo., 129:21-130:12; DeVault

Depo. I, Ex. 18 (attached as Ex. 4 to Holt Decl.).

104. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] DeVault Depo. I, Ex. 18.

105. [REDACTED]  
[REDACTED]

[REDACTED] Paulson Depo., 130:16–132:11; DeVault Depo. I, Ex. 20 (attached as Ex. 5 to Holt Decl.).

106. [REDACTED]  
[REDACTED]

[REDACTED] Paulson Depo., 132:12–133:16; DeVault Depo. I, Ex. 21 (attached as Ex. 6 to Holt Decl.).

107. [REDACTED]  
[REDACTED]

[REDACTED] Paulson Depo., 133:17–134:17; DeVault Depo. I, Ex. 22 (attached as Ex. 7 to Holt Decl.).

108. [REDACTED]  
[REDACTED]

[REDACTED] Paulson Depo., 134:18–135:16; DeVault Depo. I, Ex. 23 (attached as Ex. 8 to Holt Decl.).

109. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] DeVault Depo. I, Ex. 23.

110. [REDACTED]

[REDACTED] DeVault Depo. I, Ex. 24 (attached as Ex. 9 to Holt Decl.).

111. [REDACTED]

[REDACTED] Kiesau Depo., 121:9–14; DeVault Depo. I, 128:23–129:16; Holt Decl., Ex. 36, Epic’s Responses to MEDHOST of TN’s First Set of Interrogatories, Interrogatory Nos. 8, 17.

112. [REDACTED]

[REDACTED]

Faulkner Depo., 271:7–277:17.; Ex. 41; Holt Decl., Ex. 36, Epic’s Response to MEDHOST of TN’s First Set of Interrogatories, Interrogatory Nos. 8, 17; Holt Decl., Ex. 37, Epic’s Response to MEDHOST of TN’s First Set of Requests for Production, Request No. 6; DeVault Depo II, 74:1-75:9.

113. [REDACTED]

### **III. Background of the Defendants and YCU’s YOURCAREEVERYWHERE mark**

#### **A. MEDHOST’s business**

114. [REDACTED]

115. YCU offers a range of software tools and services that assist healthcare providers in managing the business of healthcare. Hart Decl. at ¶ 5.

116. MEDHOST TN is the provider of the Enterprise EHR software system. Hart Decl. at ¶ 3.

117. [REDACTED]

118. [REDACTED]

**B. The Defendants' adoption of a YOURCARE family of marks and the creation of YCU**

119. [REDACTED]

120. [REDACTED]

121. [REDACTED]

122. [REDACTED]

123. Around that same time, the decision was made to brand the entire solution of products as YOURCAREUNIVERSE and use a YOURCARE family of marks to identify the individual products. Mitchell Depo., 78:4–19; 74:12–21.

124. [REDACTED]

125. [REDACTED]

126. [REDACTED]

[REDACTED] The YOURCAREEVERYWHERE website and services launched in March 2015. Hart Decl. at ¶ 22.

127. Concurrently with the launch of the YOURCAREEVERYWHERE website, YCU engaged in a marketing campaign designed to maximize awareness of the YOURCAREEVERYWHERE website and provider services. Hart Decl. at ¶ 23.

128. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

129. [REDACTED]

[REDACTED]

130. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

131. [REDACTED]

[REDACTED]

[REDACTED]

132. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

133. [REDACTED]

[REDACTED]

[REDACTED]

134. YCU's marketing activities for YOURCAREEVERYWHERE include online advertisements, social media, and public relations, among other things. Hart Decl. at ¶ 29.

135. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

136. [REDACTED]

[REDACTED]

[REDACTED].

137. [REDACTED]

[REDACTED]

[REDACTED].

138. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

139. [REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

140. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

141. [REDACTED]

[REDACTED]

142. Consistent with the reasons for adopting the other YOURCARE-formative marks, YourCareUniverse and MEDHOST have developed and use a family of marks formed from the prefix YOURCARE in addition to YOURCAREEVERYWHERE, including these marks:

- A. YOURCAREANALYTICS
- B. YOURCARELINK
- C. YOURCAREREFERRAL
- D. YOURCARETRANSFER
- E. YOURCAREHEALTH
- F. YOURCAREPROVIDER
- G. YOURCARESUCCESS
- H. YOURCAREDATA
- I. YOURCAREEXCHANGE
- J. YOURCAREINTERACT
- K. YOURCARENAVIGATION
- L. YOURCAREWELLNESS
- M. YOURCARECOMMUNITY

N. YOURCAREKNOWLEDGE

O. YOURCAREMESSENGER

P. YOURCAREVISUALIZE

Hart Decl. at ¶ 7; Hart Depo., 111:23-116:24; Ex. 15 (attached as Ex. 19 to Holt Decl.); Deposition of Lauren Douglass (“Douglass Depo.”), Doc. 95, 18:16-19:8.

**C. The YourCareEverywhere website and its relation to the Defendants’ other products**

143. [REDACTED]

[REDACTED]

[REDACTED].

144. Users of the YOURCAREEVERYWHERE website encounter the YOURCAREEVERYWHERE word mark and logo prominently displayed on the website’s header and in other locations throughout the site. The YOURCAREEVERYWHERE logo appears as follows:



Hart Decl. at ¶ 9.

145. Users of the YOURCAREEVERYWHERE mobile application encounter the YOURCAREEVERYWHERE word mark and logo displayed in the app. The icon displayed on the mobile device for the app appears as follows:



Hart Decl. at ¶ 10.

146. YCU uses the YOURCAREEVERYWHERE mark primarily in association with a consumer health and wellness content website, [yourcareeverywhere.com](http://yourcareeverywhere.com). YCU also offers a related mobile app and marketing services under the YOURCAREEVERYWHERE mark. Hart Depo., 147:23-149:22; 21:12-15; 70:22-25.

147. YCU's patient portal product is called YOURCAREHEALTH. Anderson Depo., 27:16-20.

148. [REDACTED]

149. [REDACTED]

150. [REDACTED]

**D. YCU and MEDHOST's marketing and sales**

151. YCU considers the YOURCAREEVERYWHERE product a consumer focused (as opposed to a healthcare provider focused) brand. YCU primarily uses the YOURCAREEVERYWHERE Mark in connection with a free, publicly available website ([www.yourcareeverywhere.com](http://www.yourcareeverywhere.com)) containing general information related to health and wellness topics and an associated smartphone application. Users of the YOURCAREEVERYWHERE website and app can access free articles and information related to health and wellness topics, such as articles related to diseases and conditions, healthcare news, pregnancy and childbirth, children and teen care, heart care, mental health, and exercise and nutrition. Hart Decl. at ¶ 8.

152. In addition to accessing health and wellness content, users of the YOURCAREEVERYWHERE website and app may also register an account. If a user registers an account, he or she may use their YOURCAREEVERYWHERE account to track certain health and wellness data, such as activity data from a Fitbit device. Hart Decl. at ¶ 11.

153. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

154.

[REDACTED]

155.

[REDACTED]

156.

[REDACTED]

157.

[REDACTED]

158.

[REDACTED]

[REDACTED]

[REDACTED]

159. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

160. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]:

A. [REDACTED].

B. [REDACTED]

C. [REDACTED].

Hart Decl. at ¶ 18.

161. [REDACTED]

[REDACTED]

[REDACTED].

162. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

163. [REDACTED]

[REDACTED]

[REDACTED]

164. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

#### **IV. The Healthcare Market**

##### **A. Other uses of “care” and “everywhere”**

165. [REDACTED]

[REDACTED]

[REDACTED] Kiesau Depo., 137:21–138:18; Expert Report of Mark R. Anderson (“Anderson Report”), Doc. 110, 34; Paulson Depo., 99:11–100:17.

166. [REDACTED]

[REDACTED]

[REDACTED].” Kiesau Depo., 137:24–138:18; Anderson Report, 34.

167. Many third parties also use the particular phrase “care everywhere” in various registered and applied-for marks in the healthcare market, including:

A. EXPERT CARE EVERYWHERE, Reg. No. 2606638.

B. EVERYWHERECARE, Reg. No. 3169541.

C. HEALTHCARE EVERYWHERE, Ser. No. 86/902,476 is an application for which the trademark examining attorney found no conflicting marks that would bar registration. The applicant is simply required to disclaim the exclusive right to use “HEALTHCARE” apart from the mark.

D. CARE. VIRTUALLY EVERYWHERE, Ser. No. 85/904,198 is an allowed application. Once a statement of use is filed, it will register.

Cert. of Reg. No. 2606638; Cert. of Reg. No. 3169541; June 1, 2016 Trademark Office Action for Ser. No. 86/902,476; Notice of Allowance for Ser. No. 85/904,198.

168. [REDACTED]

[REDACTED] Paulson Depo., 88:21–90:2; 94:4–94:18; Ex. 6 (attached as Ex. 15 to Holt Decl.); Epic’s Responses to MEDHOST TN’s First Set of Requests for Admission, Nos. 14 & 15 (attached as Ex. 33 to Holt Decl.).

169. [REDACTED]

[REDACTED] Paulson Depo., 88:21–90:2; 94:4–94:18.

170. [REDACTED]

[REDACTED]. Paulson Depo., 89:1-90:2.

171. [REDACTED]

[REDACTED] Paulson Depo., 90:3-95:9, Ex. 7 (attached as Ex. 24 to Holt Decl.).

172. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] Paulson Depo., 88:21–89:22; 96:20–99:3; 93:18-94:3; 112:9-13; 113:22-114:3; 119:8-14; 121:18-122:9.



**B. Government regulation and Meaningful Use**

173. [REDACTED]

[REDACTED] DeVault Depo. I, 35:16-36:1.

174. Virtually all organizations, including MEDHOST and Epic, meet the U.S. Government's certification requirements for meaningful use of healthcare technology because it is required to survive in the industry. Anderson Depo., 24:21-26:10; 46:21-47:2.

175. [REDACTED]

[REDACTED]. DeVault Depo. I, 155:19-23; 232:1-10; Anderson Depo., 55:9-56:23.

176. [REDACTED]

[REDACTED] DeVault Depo. I, 128:23-129:16.

177. [REDACTED]

178. [REDACTED]

**C. Lack of competition between the Defendants and Epic**

179. [REDACTED]

[REDACTED] Faulkner Depo., 39:13-16, 21-25.

180. [REDACTED]

[REDACTED] Faulkner Depo., 84:18–85:3; 197:13-198:2.

181. [REDACTED]

[REDACTED] DeVault Depo. I, 158:9–19.

182. [REDACTED]

[REDACTED] Faulkner Depo., 40:23–25; 184:17–20.

183. [REDACTED]

[REDACTED] Cohen Depo., 17:1–19:18. [REDACTED]

[REDACTED] Cohen Depo., 83:5-16; Faulkner Depo., 84:18-85:3.

184. To the extent there is any competition between MEDHOST and Epic, the competition is at the healthcare organization and provider (not the patient) level. Holt Decl., Ex. 21, November 21, 2016 Letter (amending Epic’s response to MEDHOST TN’s Request for Admission No. 10).

185. [REDACTED]

[REDACTED] Fuhrmann Depo., 258:1–6; Kiesau Depo., 133:19–134:5.

[REDACTED] DeVault Depo. I, 160:21-

161:1.

186. [REDACTED]

[REDACTED]

[REDACTED]

187. [REDACTED]

[REDACTED]

[REDACTED] Kiesau, Depo., 99:23–100:15; DeVault Depo. I, 126:4–16.

188. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Cohen Depo., 12:5-14:15; 142:14-144:1 [REDACTED]

[REDACTED]

189. [REDACTED]

[REDACTED]

Faulkner Depo., 178:7-182:17; 186:8-189:1; Exs. 20 & 21 (attached as Exs. 13 and 14 to Holt Decl.).

190. [REDACTED]

[REDACTED]

[REDACTED] Faulkner Depo.,

178:7-179:18; 180:21.

191. [REDACTED]

[REDACTED]

[REDACTED] Cohen Depo.,  
152:21-153:13; Faulkner Depo., Ex. 21 (attached as Ex. 14 to Holt Decl.).

**D. Sophistication of participants in the market**

192. [REDACTED]

[REDACTED]

[REDACTED] Faulkner Depo., 31:32–  
32:2; 10:12–16.

193. [REDACTED]

[REDACTED] Faulkner Depo., 70:25–71:6; DeVault Depo. I, 263:1–6; Gordee Depo.,  
11:20-13:19; 70:1-73:7.

194. [REDACTED]

[REDACTED]

[REDACTED] Gordee Depo., 70:6-73:7.

195. [REDACTED]

[REDACTED]

[REDACTED] Faulkner Depo., 270:3–271:4; DeVault Depo. I, 222:3–6; Gordee Depo, 74:21-75:14.

196. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Fuhrmann Depo., 171:8–11; DeVault Depo. I, 224:5–12; Kiesau  
Depo., 40:8–16.

197. [REDACTED]

[REDACTED]

[REDACTED] Fuhrmann Depo., 80:7–22.

**V. The Dispute between Epic and the Defendants**

**A. The opposition proceeding before the Trademark Trial and Appeal Board**

198. [REDACTED]

[REDACTED]

[REDACTED] DeVault Depo. I, Ex. 34 (attached as Ex. 10 to Holt Decl.).

199. On April 24, 2015, after conducting a search for conflicting trademarks, the trademark examiner allowed YCU's YOURCAREEVERYWHERE mark over Epic's mark. YCU\_224466-87 (attached as Ex. 30 to Holt Decl.).

200. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

DeVault Depo. I, Ex. 34; Am. Compl. (Doc. 48), ¶32; YCU\_224466-87 (attached as Ex. 30 to Holt Decl.).

201. [REDACTED]

[REDACTED]

Doc. 48, ¶ 30; Doc. 51, ¶ 30; Paulson Depo., 82:8–84:16, 87:23–88:9.

202. On June 19, 2015, Epic instituted an opposition proceeding before the Trademark Trial and Appeal Board to oppose registration of the YOURCAREEVERYWHERE mark. *See, e.g.*, Motion to Stay (Doc. 21).

203. The parties progressed in that proceeding, conducting discovery and other activities, for over six months. *See, e.g.*, Motion to Stay (Doc. 21).

204. On December 22, 2015, Epic filed its initial complaint in this Court. Complaint, Doc. 1.

205. Epic then moved to suspend the proceeding before the Board in favor of this litigation on December 28, 2015. Epic’s Opposition to YCU’s Motion to Stay (Doc. 26).

206. At the time that Epic moved to suspend its opposition proceeding, expert disclosures were due in less than a month, discovery closed in less than two months, and the trial period was set to begin in less than four months. The trial period would have concluded on September 6, 2016. *See* Motion to Stay (Doc. 21).

207. Based on the progression of Epic’s opposition proceeding, YCU moved to stay this litigation and opposed a suspension before the Board because it would be the most efficient and inexpensive means to resolve the parties’ dispute. Motion to Stay, Doc. 21.

208. The Court ultimately denied the motion to stay. Order Denying Motion to Stay, Doc. 46.

**B. Discovery has revealed no actual confusion and, no actual damages**

209. The YourCareEverywhere.com website has been live since March 2015. Hart Decl. at ¶ 22.

210. [REDACTED]

211. [REDACTED]

[REDACTED] Paulson Depo., 142:18–143:5; DeVault Depo. II 120:16–121:14; Holt Decl., Ex. 21, November 21, 2016 (amending Epic’s Response to MEDHOST TN’s Request for Admission No. 2).

212. [REDACTED]

[REDACTED] Faulkner Depo., 31:32–32:2; 10:12–16.

213. [REDACTED]

[REDACTED] Cohen Depo., 32:10–16; 33:10–16.

214. [REDACTED]

[REDACTED] Faulkner Depo., 10:8–20; 37:20–25; Epic’s Revised Response to YCU’s First Set of Interrogatories, No. 14 (attached as Ex. 34 to Holt Decl.).

215. [REDACTED]

[REDACTED] Epic’s Revised Response to YCU’s First Set of Interrogatories, No. 14 (attached as Ex. 34 to Holt Decl.); Faulkner Depo., 35:19–38:5.

216. [REDACTED]

[REDACTED]  
217. [REDACTED]  
[REDACTED]

218. [REDACTED]

[REDACTED] DeVault Depo. I, 189:14-190:12, 191:25-193:6, 201:14-202:14, Exs. 27 & 28 (attached as Exs. 43 and 44 to Holt Decl.); Kiesau Depo., 57:8-19, 71:17-73:17.

219. [REDACTED]

[REDACTED] Kiesau Depo., 66:22-67:5; Hutchison Depo., 33:7-35:18; Faulkner Depo., 38:1-5.

220. The USPTO rejected YCU's application for the mark YOURCARE for the following services on descriptiveness grounds:

providing temporary use of on-line non-downloadable cloud computing software for use in the healthcare field, namely, software for managing, storing, analyzing, maintaining, processing, structuring, reviewing, building, editing, distributing, communicating, organizing, sharing, referencing, monitoring and integrating healthcare information for healthcare providers, patients, and customers.

TTAB Decision on YOURCARE Appeal (Serial No. 86505916) (attached as Ex. 25 to Holt Decl.).

221. In affirming the trademark examining attorney's refusal to register the YOURCARE mark, the TTAB found persuasive the examining attorney's submission of a dictionary definition of the word "care" as "the provision of what is necessary for the health, welfare, maintenance, and protection of someone or something ... health care." TTAB Decision on YOURCARE Appeal (Serial No. 86505916), at 3-4 (attached as Ex. 25 to Holt Decl.).

222. The TTAB further cited the examining attorney's submission of "fourteen registrations for marks containing the word CARE in which CARE is disclaimed," e.g.:



Reg. No. 4002633 - CARE ELSEWHERE<sup>3</sup>

Services: Computer software for use in medical and healthcare fields, namely, computer software for managing, acquiring, storing, analyzing, maintaining, processing, structuring, reviewing, building, editing, distributing, communicating, organizing, sharing, referencing, monitoring and integrating information, and accompanying manuals sold as a unit; computer software for automating clinical and administrative healthcare processes;

Reg. No. 3693510 - CARE VISIBILITY

Services: Computer software for managing workflow, resource utilization, and patient care in a health care setting;

Reg. No. 3611361-ANTHEM CARE COMPARISON

Services: Providing an online tool, namely, providing temporary use of non-downloadable software that provides consumers with information about costs for various medical procedures;

Reg. No. 3686032 - CARE OPPORTUNITIES

Services: Application service provider, namely, providing, hosting, managing, developing, and maintaining a webbased application, web sites and databases that link medical information with medical claims data and the applicable standards of care, to provide clinical decision support for chronic medical conditions electronically; providing electronic clinical decision support, namely, providing a website featuring on-line non-downloadable software tools for making medical care decisions based on medical information, medical claims data, and standards of care, designed to assist health professionals with decision making tasks; and

Reg. No. 4240990 - EZ CARE

Services: Computer software for management, disease management, management in healthcare industry.

TTAB Decision on YOURCARE Appeal (Serial No. 86505916), at 4-5 (attached as Ex. 25 to Holt Decl.). The TTAB commented, “[t]hese registrations reflect that the word ‘CARE’ is considered descriptive by the USPTO when used in connection with software for healthcare related services.” *Id.* at 5.

223. The YOURCARE mark was subsequently registered on the Supplemental Register of trademarks. YOURCARE Registration No. 5,009,851 (attached as Ex. 31 to Holt Decl.).

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<sup>3</sup> This is Plaintiff’s mark and registration.

224. YCU's applications for the trademarks YOURCAREDATA, YOURCAREREFERRAL, YOURCAREANALYTICS, and YOURCARETRANSFER were refused registration on the Principal Register on descriptiveness grounds, and are now also registered on the Supplemental Register. YOURCAREANALYTICS Registration No. 4,990,560; YOURCAREDATA Registration No. 4,990,562; YOURCAREREFERRAL Registration No. 4,990,559; YOURCARETRANSFER Registration No. 4,990,561 (attached as Exs. 26-30 to Holt Decl.).

Dated: December 2, 2016

Respectfully submitted,

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